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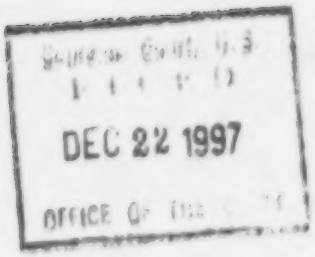

NO:

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

SYLVESTER MOSLEY
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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97-7213
Mosley
v.
United States

QUESTIONS PRESENTED

1. Whether Bank Larceny, in violation of 18 U.S.C. § 2113(b), is a lesser included offense of Bank Robbery in violation of 18 U.S.C. §2113(a), as a matter of law, pursuant to the textual "elements" test adopted by the United States Supreme Court in Schmuck v. United States, 489 U.S. 705, 109 S.Ct. 1443 (1989).

2. Whether the admission at trial of testimonial and documentary evidence regarding petitioner's propensity to commit crime and his bad character and lack of good character pursuant to Fed. R. Evid.404 (b) and 403 deprived petitioner of his Sixth Amendment right to a fair trial.

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PRAYER

The petitioner, Sylvester Mosley, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Third Circuit issued September 18, 1997.

PARTIES TO THE PROCEEDING

In accordance with Rule 14.1(b) of this Court, all parties to the proceeding are cited in the case caption.

OPINIONS BELOW

On September 18, 1997, the United States Court of Appeals for the Third Circuit docketed a Judgment and filed an Opinion affirming the Judgment of Conviction entered by the United States District Court for the District of New Jersey. (Pa 2-14)[1]

On January 21, 1997, the United States District Court for the District of New Jersey filed an Opinion denying Petitioner's Motion for a new trial and judgment of acquittal as to Count II of the Indictment. (Pa 15-46).

STATEMENT OF JURISDICTION

Jurisdiction to review the September 18, 1997, judgment and opinion of the United States Court of Appeals for the Third Circuit (Pa 1) is conferred on The United States Supreme Court by 28 U.S.C. § 1254(1).

The Court of Appeals for the Third Circuit had jurisdiction to review the judgment of conviction of the United States District Court for the District of New Jersey pursuant to 28 U.S.C. § 1291.

The United States District Court for the District of New Jersey had jurisdiction over this matter pursuant to 18 U.S.C. § 3231.

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[1]The appendix included in this Petition will be referred to as "Pa" followed by page reference.

CONSTITUTIONAL PROVISION INVOLVED

The relevant constitutional provision involved is the Sixth Amendment to the United States Constitution, which guarantees the right to a fair trial, and states:

Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATUTORY PROVISIONS INVOLVED

Title 18 U.S.C. § 2113. **Bank robbery and incidental crimes**

(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association;

Title 18 U.S.C. § 2113.

(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $1,000 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined under this title or imprisoned not more than ten years, or both;

STATEMENT OF THE CASE

Course of Proceedings:

On January 4, 1996, Indictment Number 96-12 was filed charging petitioner, Sylvester Mosley, with two counts of bank robbery in violation of 18 U.S.C. § 2113(a) and 2. (App. 1-2, 5).[2] Mosley was arraigned on the Indictment and pled not guilty on January 17, 1996. (App. 6).

Relevant to this petition, Mosley filed a motion for a pretrial determination of the admissibility of evidence pursuant to Fed. R. Evid. 404(b) and 403 on February 2, 1996. (App. 6, 29). The district court ruled that Mosley was only entitled to notice, pretrial, of the government's intention to introduce evidence regarding a prior bank robbery conviction of Mosley pursuant to Fed. R. Evid. 404(b) and that it would not make a pretrial determination as to its admissibility. (App. 29-30).

Mosley was tried before a jury on March 4 and 5, 1996. (App. 61-373). After beginning deliberations, the jury had one question regarding the bank robbery charged in Count II of the Indictment. (App. 367-369). The question was answered by the Court, and the jury returned to its deliberations. Shortly thereafter the jury returned verdicts of guilty as to both counts of the Indictment. (App. 369-370).

On March 12, 1996, Mosley filed a timely Notice of Motion for a new trial pursuant to Fed. R. Crim. P. 33 and for a Judgment of Acquittal as to Count II of the Indictment pursuant to Fed. R. Crim P. 29(c). (App. 7, 9-10).

On December 9, 1996, the district court heard arguments on the post-trial motions and denied both of them. (App. 374-389). Also, on December 9, 1996, the Court sentenced

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[2] "App." followed by page numbers refers to pages from the Appendix filed with Mosley's brief to the United States Court of Appeals for The Third Circuit.

Mosley to, among other things, 210 months imprisonment on each count to be served concurrently with each other. (App. 387-388).

On December 9, 1996, the district court filed a Judgment of Conviction, (App. 14) and sua sponte, the district court filed an Amended Judgment of Conviction on January 23, 1997. (App. 18). (Pa 50-57).

On January 21, 1997, the district court filed a letter-opinion regarding Mosley's post-trial motions. (Pa 15-46).

The United States Court of Appeals for the Third Circuit affirmed Mosley's conviction in a Judgment and Opinion issued September 18, 1997. (Pa 2-14).

The United States Court of Appeals for the Third Circuit denied Mosley's petition for rehearing en banc in an Order issued December 15, 1997. (Pa 1).

Statement of Facts:

Mosley conceded in his opening statement to the jury that he, in fact, entered both banks charged in the Indictment and that he took money from those banks. (App. 122). He conceded the issue of identity. (App. 122). His defense was that his conduct with respect to both counts of the Indictment did not satisfy the requisite elements of bank robbery in violation of 18 U.S.C. § 2113(a). (App. 124-130).

COUNT I

As to Count I of the Indictment, a bank teller at the First Fidelity Bank, 233 Fifth Avenue, Paterson, New Jersey, testified that she was working on November 20, 1995. (App. 130). She testified that Mosley was waiting his turn on line and approached her window. (App. 131-132). After saying "Good morning" to her he leaned into her window and said "This is a hold up." (App. 132). Mosley then said "open your bottom drawer and give me all the big bills, start with the big bills first." (App. 132). Ms. Neufville testified that she was

nervous, that she wet her pants and that she threw money on the counter. (App. 132-133). She asked Mosley if she could go to the bathroom and he replied "Hurry, hurry, open the drawer and give me the big bills first." (App. 133). She testified that Mosley "gestured to his coat as if he had something there." (App. 133). After throwing the money on the counter she ran to the head teller and said, "I just been held up, I just been held up." (App. 133).

On cross-examination, Ms. Neufville testified that, after giving Mosley the money, that she locked her drawer and started walking toward the bathroom. (App. 140). She was interviewed by the local police the day of the incident and, stated nothing regarding Mosley having a weapon. (App. 143). She testified that there were 10 or 11 other customers in the bank at the time of the incident. (App. 144-145).

FBI Special Agent Carolyn Zimmer testified that she interviewed Ms. Neufville shortly after the incident (App. 245) and prepared a report contemporaneous to the interview. (App. 247). Special Agent Zimmer reported that Ms. Neufville walked away from her teller station after the incident; (App. 251-252) that Mosley had a "sickly appearance" (App. 252) and that Mosley had told the teller, at the time of the incident, that he was "sick." (App. 253-254).

FBI Special Agent John Conway testified that he arrested Mosley on November 20, 1995 after the incident charged in Count I of the Indictment (App. 179) and that Mosley stated "We robbed the bank, the First Fidelity Bank." (App. 181). He testified that he never asked Mosley to explain what he meant by the word "Rob." (App. 191); and that he wrote a detailed report of the incident. (App. 191). He testified that there was nothing in his report regarding threats, force or intimidation on the part of Mosley with respect to both counts of the Indictment. (App. 193). He also testified regarding bank surveillance video tapes of both

incidents charged in the indictment and that they did not reveal evidence of threats, force, intimidation or violence. (App. 167-203).

Reverend Louis McDowell testified that he was a customer in the bank on November 23, 1995 (App. 265); that he was directly behind Mosley (App. 265); that he did not observe Mosley make any motions with respect to Ms. Neufville (App. 266); and that he did not see anything that he would characterize as force or violence. (App. 266). He testified that Mosley walked past him and out of the bank (App. 268), and that Ms. Neufville walked away from her teller station. (App. 269).

COUNT II

As to Count II, Monica Brown testified that she was working as a teller at the First Fidelity Bank, 1008 Madison Avenue, Paterson, New Jersey on November 9, 1995, at the time of the incident charged in Count II of the Indictment. (App. 157-158).

Ms. Brown's testimony, on direct examination, was that she was held up by a man who held up a sign with both of his hands that said in capital letters "HOLD UP". (App. 157-158). She testified that she was scared and nervous and that Mosley placed both his hands down and asked her for money by saying "Can I have all your money?" (App. 159-160).

Ms. Brown further testified that Mosley employed a defensive but demanding tone of voice, but that he said nothing else to her. (App. 160). She proceeded to give Mosley "bait money" but Mosley threw it back. (App. 160). She then proceeded to give him the other money and that Mosley walked away in a fast pace. (App. 161). She testified that she was very nervous and scared after Mosley left the bank. (App. 162).

On cross-examination, Ms. Brown testified that she never told the Paterson Police or the FBI Agents that she saw Mosley with a weapon and that both of Mosley's hands were visible to her. (App. 167). She testified that the incident lasted about five seconds. (App.

168). In conclusion, Ms. Brown testified that Mosley appeared to be homeless, that he had bags under his eyes, and that he appeared to be 60 years old. (App. 170).

The other evidence with respect to Count II came from the testimony of FBI Special Agent John Conway. Special Agent Conway testified that he arrested Mosley (App. 186), discussed the allegations in this case with him and wrote a detailed report of his interview of Mosley. (App. 191-192). Special Agent Conway testified that his report contained nothing about force, violence or intimidation of the part of Mosley. (App. 193).

Special Agent Conway also testified regarding the surveillance videotape regarding Count II. (App. 215). He testified that the videotape revealed several customers and bank employees present at the time of the incident charged in Count II of the Indictment. (App. 217, 226-227). He further testified that the videotape revealed no evidence of violence or force on part of the Mosley. (App. 227-228). Finally, there was no testimony that the videotape revealed evidence of intimidation on the part of Mosley. (App. 228).

Paterson, New Jersey Police Officer Robert Medwick testified that he interviewed Ms. Brown shortly after the incident charged in Count II and that he wrote a report. (App. 260-262). Officer Medwick reported that Ms. Brown said that Mosley asked her for the money, she gave it to him, that he fled without saying anything else and that he was not brandishing any kind of weapon. (App. 263). He further testified that he interviewed Ms. Brown within 16 minutes of the incident and that she did not appear to be upset. (App. 263). Ms. Brown described Mosley as "homeless looking." (App. 263).

Marisol Maccarotta testified that she was working as a teller at the same bank as Monica Brown on November 9, 1995. (App. 269-270). She testified that she was one teller station away from Ms. Brown; that Mosley was standing on a line to be waited on at the

teller stations; (App. 271) and that she did not hear or see anything regarding the incident charged in Count II. (App. 273).

REASONS FOR GRANTING THE WRIT OF CERTIORARI

This case presents an important question of federal appellate law on which the Circuit Courts of Appeal are split and it presents an important federal constitutional issue regarding the right to a fair trial.

Firstly, the opinion in United States v. Mosley, 126 F.3d 200 (3d Cir. 1997), holding that Bank Larceny, in violation of 18 U.S.C. § 2113(b), is not, as a matter of law, a lesser included offense of Bank Robbery, in violation of 18 U.S.C. § 2113 (a), directly conflicts with the holdings of the Court of Appeals for the First, Fourth, Fifth, Sixth, Eighth, Tenth and Eleventh Circuits. See United States v. Mosley, (Pa 12, 13)(Collecting cases). This conflict results in an intolerable disparate treatment of criminal defendants that happen to be charged within the jurisdiction of the Third Circuit as opposed to being charged in virtually any other federal jurisdiction within the United States. Indeed, the Third Circuit acknowledged that its opinion was against the weight of authority. (Pa 2), (Pa 11, 12).

Moreover, the Third Circuit's holding in United States v. Mosley incorrectly applies the textual "elements" test for determining whether an offense is "necessarily included" in the offense charged that was adopted by this Court in Schmuck v. United States, 489 U.S. 705, 109 S.Ct. 1443 (1989).

Secondly, at trial, testimonial and documentary evidence regarding petitioner's propensity to commit crime and his bad character and lack of good character was admitted in the prosecution's case-in-chief. See e.g. Government Exhibit 118 (Pa 47-49). Whereas,

> "Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character, *Greer v. United States*, 245 U.S. 59, 38 S.Ct. 209, 62 L.Ed. 469, but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not reflected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so over persuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, it the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice." *Michaelson v. United States*, 335 U.S. 469, 475-476, 69 S.Ct. 213, 218-219, 93 L.Ed. 168 (1948) (footnotes omitted);

(cited with approval) Old Chief v. United States, ___U.S.___, 117 S.Ct. 644, 650 (1997).

To resolve the split in the Circuit Courts of Appeal and to vindicate and preserve petitioner's Sixth Amendment right to a fair trial, this Court should grant the Writ of Certiorari and reverse the opinion of the Third Circuit.

LEGAL ARGUMENT

POINT I

BANK LARCENY IS A LESSER INCLUDED OFFENSE OF BANK ROBBERY, 18 U.S.C. §§ 2113(a) AND (b)

Federal Rule of Criminal Procedure 31 (c) permits a jury to return a verdict of guilty as to an offense "necessarily included in the offense charged." In Schmuck v. United States, 489 U.S. 705, 716, 109 S.Ct. 1443, 1450 (1989) the Supreme Court adopted the "elements" test of determining whether an offense is "necessarily included" in the offense charged pursuant to Fed.R.Crim.P. 31(c). Under the "elements" test, a lesser offense cannot contain an element not required for the greater offense. The elements of the lesser offense must be

a "subset" of the elements of the offense charged. Schmuck, 489 U.S. at 714, 722, 109 S.Ct. At 1450, 1453.

This "comparison is appropriately conducted by reference to the statutory elements of the offenses in question..." 489 U.S. at 718, 109 S.Ct. At 1451. Significantly, this Court in Schmuck then stated that the comparison must be "textual." Id. at 720, 109 S.Ct. 1452-53.

Therefore, this Court did not state that the "exact same words" defining an element of the lesser offense must appear in the definition of the element in the greater offense. Petitioner Mosley most respectfully submits that the critical distinction between a "textual" comparison to determine a "subset" versus an "exact same words" comparison to determine the existence of a "subset" is the cause of the error in the Third Circuit's opinion sub judice.

In United States v. Mosley, the Third Circuit states that "[i]t is obvious that the definition of bank robbery in subsection (a) does not include an element that the defendant have the 'intent to steal or purloin.' On the other hand, bank larceny, as defined in subsection (b) includes this element." (Pa 9). Whereas, petitioner respectfully argues that "textually", the bank robbery statute contains the dictionary definition of "steal or purloin." That is, 18 U.S.C. §2113(a) contains the element "...takes or attempts to take, from the person..." and the word "steal" is commonly defined as "to take the property of another". See e.g. Webster's New Collegiate Dictionary, G & C Merrian Co. (1974) p. 1138. The word "purloin" is a synonym of "steal". Webster's at 937. Therefore, the terms employed in the text of the bank robbery and bank larceny statutes are alternative means of defining the same element.

Because the element "steal or purloin" contained in the bank larceny statute, 18 U.S.C. § 2113(b), is by definition contained in the bank robbery statute, 18 U.S.C. § 2113(a) (...take or attempt to take, from the person...) petitioner submits that it is a textual subset, and

therefore, as a matter of law, a lesser included offense within the meaning of the "elements" test adopted in Schmuck v. United States.

POINT II

ADMISSION AT TRIAL OF TESTIMONIAL AND DOCUMENTARY EVIDENCE REGARDING PETITIONER'S PROPENSITY TO COMMIT CRIME AND HIS BAD CHARACTER AND LACK OF GOOD CHARACTER DEPRIVED PETITIONER OF HIS SIXTH AMENDMENT RIGHT TO A FAIR TRIAL.

Mosley has a prior conviction for bank robbery of the First Fidelity Bank located on Madison Avenue, Paterson, New Jersey. This is the same bank that is the subject of Count II of the Indictment in this case. (App. 1-2). Mosley was charged with committing this prior bank robbery on April 30, 1991. He pled guilty and a Judgment of Conviction and Commitment Order was entered in the Superior Court of New Jersey, Passaic County on October 22, 1993. (App. 23-25) (Government Exhibit 118 at the trial). (Pa 47-49).

Mosley moved pretrial for a determination whether evidence regarding this prior bank robbery conviction should be admissible at trial. (App. 29). The district court ruled that Mosley was only entitled to pretrial notice of the government's intention to introduce evidence regarding this prior bank robbery conviction pursuant to Fed.R.Evid. 404(b), and that it would not make a pretrial determination as to its admissibility. (App. 29-30). The district court had a copy of government exhibit 118 (App. 377) (Pa 47-49) and stated that it was inclined to admit it at trial. (App. 32-33, 43, 60).

At trial the government indicated its intention to introduce in evidence Exhibit 118. (App. 177). (Pa 47-49). At sidebar, without hearing argument, the district court stated that "It seems to me its relevant." (App. 177). Mosley reiterated his objection pursuant to Fed.R.Evid.404(b) and 403 and argued "...its five years old, its remote, its not relevant to

what [happened in this case] and the prejudicial just has the potential to overwhelm any appropriateness as to what [Mosley] may have done five years ago". (App. 177-178). The district court admitted Exhibit 118 into evidence. (App. 178). The district court had a copy of Exhibit 118 at sidebar. (App. 378).

Mosley was permitted to voir dire the government's witness as to the authenticity of Exhibit 118. (App. 185). In light of the district court's ruling that Exhibit 118 was going to be admitted into evidence, Mosley raised no objection as to the authenticity of Exhibit 118. (App. 186).

The fact that Mosley continued to object to the admission of Exhibit 118 but not as to its authenticity, was clarified and the district court stated that it understood. (App. 219; 365-366).

Government Exhibit 118 consists of three pages. (App. 23-25). (Pa 47-49).

The first two pages state that Mosley was sentenced to the:

> Count I - Custody of the Commissioner of the Department of Corrections for 7 years. Said sentence to run concurrent with violation of probation. SSCP $75.00. Said sentence to run concurrent with sentence on 91-06-0980.

It also states the reason for Mosley's sentence as:

> Aggravating Factors: Risk that defendant will commit another offense. Extent of defendant's prior criminal record.
>
> Mitigating Factors: None.

(App. 23-26). (Pa 47-49).

Federal Rule of Evidence 404(b) prohibits the admission of evidence of other wrongs to prove a person's character "in order to show action in conformity therewith." Fed.R.Evid.

404(b). The rule allows the admission of such evidence for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Id.

In Huddleston v. United States, 485 U.S. 681 (1988), the Court set out four factors that are relevant when ruling on the admissibility of evidence under Rule 404(b):

> (1) the other crimes evidence must have a proper purpose; (2) the proffered evidence must be relevant under Fed.R. Evid. 404(b); (3) its probative value must outweigh its potential for unfair prejudice under Rule 403 balancing; and (4) the court must charge the jury to consider the other crimes evidence only for the limited purpose for which it is admitted.

See also, Government of the Virgin Islands v. Edwards, 903 F.2d 267 (3d Cir. 1990).

The primary wrong engendered by allowing the introduction of so called "similar crimes" evidence is the improper affect it has on the jury's consideration of whether the defendant committed the crime for which he is charged. A jury hearing that a defendant committed crimes in the past is likely to conclude "if he did it before he probably did it this time." See, e.g., Gordon v. United States, 383 F.2d 936, 940 (D.C. Cir. 1967), cert. denied, 390 U.S. 1029 (1968).

In United States v. Long, 574 F.2d 761, 766 (3d Cir. 1978), the Third Circuit adopted the inclusionary approach to other crimes evidence, which admits all evidence of other crimes relevant to the issue at trial except those which tend to prove only criminal disposition. See also, United States v. Scarfo, 850 F.2d 1015, 1018-1021 (3d Cir. 1988) ("[R]ule 404(b) generally prohibits ... evidence ... intended to prove propensity for crime or to suggest to the jury unfavorable inferences reflecting on [defendant's] character.").

In the present matter, Government Exhibit 118 revealed to the jury that another judge had ordered that Mosley be imprisoned for 7 years in 1993; that Mosley had violated a prior

probationary sentence; and that Mosley had been sentenced to imprisonment for another crime in addition to robbing the First Fidelity Bank on Madison Avenue, Paterson, New Jersey in 1991. (App. 23). Moreover, page two of Government's Exhibit 118 revealed to the jury that another judge had stated that there were "aggravating factors" applicable to Mosley; that there was a risk that Mosley would commit another offense; that Mosley had an extensive prior criminal record; that Mosley needed to be deterred; and that there were no "mitigating factors" applicable to Mosley. (App. 24). (Pa 47-49)

Because of the above-cited contents of Government's Exhibit 118, Mosley respectfully submits that it was error to permit the jury in this case to have it in evidence. Mosley respectfully submits that this Exhibit was relevant only for the impermissible purposes of proving "criminal disposition," "propensity for crime" and suggesting to the jury "unfavorable inferences reflecting on [Mosley's] character." United States v. Long, 574 F.2d 761, 766 (3d Cir. 1978. United States v. Scarfo, 850 F.2d 1015, 1018-1021 (3d Cir. 1988).

Assuming arguendo, that Government's Exhibit 118 was admissible pursuant to Fed.R.Evid. 404(b), Mosley argued that it was inadmissible pursuant to Fed.R.Evid. 403. Federal Rule of Evidence 403 protects the accused against "unfair prejudice." United States v. Schwartz, 790 F.2d 1059, 1061 (3d Cir. 1986) (excluding relevant 404(b) evidence under Rule 403). The balancing test required by Fed.R.Evid. 403 is not pro forma; John McShain, Inc. v. Cessna Aircraft Co., 563 F.2d 632, 635 (3d Cir. 1977). The trial court is to weigh the relevancy against any prejudice that might occur to the defendant. United States v. Goichman, 547 F.2d 778, 782 (3d Cir. 1976).

The unfair prejudice in this case caused by the admission into evidence of Government's Exhibit 118 was revealing to the jury that which another judge had stated about Mosley's propensity to commit crimes and Mosley's "aggravating" character and lack

of "mitigating" character. The inferences to be gleaned from Government's Exhibit 118 deal purely with Mosley's propensity to commit crimes and his bad character. Mosley respectfully submits that this prejudice, by far, outweighed any probativeness as to whether Mosley committed the bank robberies charged in the Indictment in this case.

Having been exposed to Government's Exhibit 118, the jury could not fairly consider whether the evidence in this case proved beyond a reasonable doubt that Mosley violated the requisite elements of bank robbery in violation of 18 U.S.C § 2113(a). In United States v. Murray, 103 F.3d 310 (3d Cir. 1997) the Third Circuit, in circumstances remarkably similar to the error complained of in the case sub judice, reversed a murder conviction and held that the district court erred under Fed.R.Evid. 404(b) and 403 by admitting testimony that the defendant had committed another murder that was not charged in the indictment. United States v. Murray, 103 F.3d at 313.

The court in Murray, stated, "trial judges need to exercise particular care in admitting such evidence". This is so for at least two reasons. First, the line between what is permitted and what is prohibited under Rule 404(b) is sometimes quite subtle. Second, Rule 404(b) evidence sometimes carries substantial danger of unfair prejudice and thus raises serious questions under Fed.R.Evid 403. Therefore, it is advisable for a trial judge to insist that a party offering Rule 404(b) evidence place on the record a clear explanation of the chain of inferences leading from the evidence in question to a fact 'that is of consequence to the determination of the action.' Fed.R.Evid. 401." United States v. Murray, 103 F.3d at 316.

No such procedures were followed in the case, sub judice, nor did the district court make any such findings prior to admitting the evidence over Mosley's objections pursuant to Fed.R.Evid. 404(b) and 403.

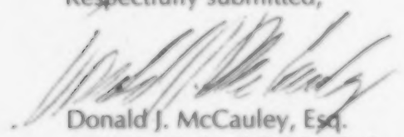
Moreover, in the present case the district court not only admitted testimony regarding Mosley's prior bank robbery conviction (App. 183-186), but also admitted documents that contained extraordinarily prejudicial and irrelevant information regarding Mosley's propensity to commit other crimes and his bad character. (See Exhibit 118, App. 23-25). (Pa 47-49)

It is respectfully submitted that this Court cannot conclude that the testimony regarding Mosley's prior bank robbery conviction and the admission of Exhibit 118 did not erroneously contribute to the jury's convicting Mosley. For the foregoing reasons, Mosley respectfully submits that his Sixth Amendment Right to a fair trial was violated and that the Third Circuit's opinion in United States v. Mosley is contrary to this Court's opinion in Old Chief v. United States, ___U.S.___, 117 S.Ct. 644 (1997).

CONCLUSION

For the reasons stated above, Petitioner respectfully requests that the requested Writ of Certiorari be issued.

Respectfully submitted,



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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-5832

UNITED STATES OF AMERICA

v.

SYLVESTER MOSLEY,

Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Crim. No. 96-00012)

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, Chief Judge, and BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, and MCKEE, Circuit Judges

---

The petition for rehearing filed by the appellant, Sylvester Mosley, in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the court in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

BY THE COURT:

Circuit Judge

DATED: DEC 15 1997

cmh/cc: DJM
MC
ESF

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-5832

UNITED STATES OF AMERICA

v.

SYLVESTER MOSLEY,

Appellant

On Appeal from the United States District Court
for the District of New Jersey
D.C. Crim. No. 96-00012

Present: Stapleton, Greenberg, and Cowen, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on August 11, 1997.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered December 11, 1996, be, and the same is hereby affirmed. All of the above in accordance with the opinion of this Court.

ATTEST:

Clerk

Dated: September 11, 1997

Filed September 18, 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-5832

UNITED STATES OF AMERICA

v.

SYLVESTER MOSLEY,

Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Crim. No. 96-00012)

Argued August 11, 1997

BEFORE: STAPLETON, GREENBERG, and COWEN,
Circuit Judges

(Filed: September 18, 1997)

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OPINION OF THE COURT

GREENBERG, *Circuit Judge*.

I. INTRODUCTION

Appellant Sylvester Mosley appeals from a judgment of conviction and sentence entered in the district court on two counts of bank robbery. Mosley argues that the district court erred in failing to instruct the jury that it could convict him of bank larceny as a lesser included offense of bank robbery.[1] This case raises an issue we have not addressed: whether bank larceny, 18 U.S.C. § 2113(b), is a lesser included offense of bank robbery, 18 U.S.C. § 2113(a). Contrary to the weight of authority, we find that bank larceny is not a lesser included offense of bank robbery. Thus, we will affirm.

The district court had jurisdiction pursuant to 18 U.S.C. § 3231. We have jurisdiction to review the judgment of the district court pursuant to 28 U.S.C. § 1291. We exercise plenary review over the legal question raised on this appeal. *United States v. Adams*, 759 F.2d 1099, 1116 (3d Cir. 1985).

1. We also have considered Mosley's claims that the district court abused its discretion in admitting evidence of his prior conviction for bank robbery pursuant to Fed. R. Evid. 404(b) and 403, and that the district court erred in failing to grant him a judgment of acquittal on count two of the indictment pursuant to Fed. R. Crim. P. 29. After careful consideration, we find that neither of these claims justifies reversal so we reject these arguments without further discussion.

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II. FACTUAL AND PROCEDURAL HISTORY

Count one of the indictment charged Mosley with knowingly and willfully, by force and violence or intimidation, taking approximately $9,344.81 from a teller at the First Fidelity Bank at 233 Fifth Avenue in Paterson, New Jersey, in violation of 18 U.S.C. §2113(a) and 18 U.S.C. §2. Count two charged him with knowingly and willfully, by force and violence or intimidation, taking approximately $2,547 from a teller at the First Fidelity Bank at 1008 Madison Avenue in Paterson, New Jersey, also in violation of 18 U.S.C. §2113(a) and 18 U.S.C. §2. After a two-day trial, the jury found Mosley guilty on both counts. The district court subsequently sentenced Mosley to concurrent 210-month terms of imprisonment on each count and it imposed concurrent three-year terms of supervised release to follow the custodial terms.

There was no real factual dispute at trial as Mosley conceded in his opening statement to the jury that he entered both banks and took money from them. Rather, his defense was that his conduct did not satisfy the requisite elements of bank robbery in violation of 18 U.S.C. §2113(a). Nevertheless, we briefly describe the robberies.

1. Count One

A bank teller at First Fidelity Bank on Fifth Avenue testified that she was working at the bank on November 20, 1995, when Mosley approached her window, leaned toward her and said "This is a hold up." He then said "open your bottom drawer and give me all the big bills, start with the big bills first." The teller testified that she was nervous, lost bladder control, and threw the money on the counter. When she asked Mosley if she could go to the bathroom, he replied, "Hurry, hurry, open the drawer and give me the big bills first." She testified that Mosley "gestured to his coat as if he had something there." After throwing the money on the counter, the teller ran to the head teller and stated "I just been held up, I just been held up."

On cross-examination, the teller testified that after giving Mosley the money, she locked the drawer and started to walk toward the bathroom. When the police interviewed her

on the day of the incident, she did not indicate that Mosley had a weapon in his possession.

FBI Special Agent Carolyn Zimmer testified that she interviewed the teller shortly after the robbery and prepared a report regarding the robbery. In that report, Zimmer stated that the teller walked away from her station after the robbery, that Mosley had a "sickly appearance," and that he told the teller that he was "sick."

FBI Special Agent John Conway testified that he arrested Mosley on November 20, 1995, after the robbery charged in count one of the indictment. He stated that Mosley said to him "We robbed the bank, First Fidelity Bank." Conway testified that he never asked Mosley what he meant when he said "rob" and that there was nothing in his report of the robbery regarding threats, force or intimidation. Conway also testified regarding the bank surveillance video tape of the robbery and that it did not reveal evidence of threats, force, intimidation or violence.

Reverend Louis McDowell testified that he was a customer in the bank on November 20, 1995, and was standing directly behind Mosley. McDowell indicated that he did not see Mosley make any motions toward the teller, nor take any actions that he would characterize as indicative of force or violence. He testified that after the robbery Mosley walked past him and out of the bank and that the teller walked away from her station.

2. Count Two

A teller at the First Fidelity Bank, 1008 Madison Avenue, testified that she was working in the bank on November 9, 1995, when a man with a sign reading "HOLD UP" approached her station. She testified that she was scared and nervous and that Mosley placed both of his hands on the counter and asked her for money by saying "Can I have all your money?" The teller testified further that Mosley used a defensive but demanding tone of voice, but said nothing else to her. When she gave Mosley "bait money," he threw it back at her. She then gave Mosley the other money, and Mosley walked away at a fast pace.

On cross-examination, the teller testified that she did not tell either the Paterson police or the FBI agents that she

saw Mosley with a weapon, and she told both that Mosley's hands were visible to her throughout the robbery, which lasted approximately five seconds. The teller testified also that Mosley appeared to be homeless, had bags under his eyes, and seemed to be about 60 years old.

Conway testified regarding the surveillance videotape regarding count two of the indictment, as well. He stated that the videotape revealed that Mosley displayed both of his hands on the counter throughout the robbery and that during the three or four seconds of the robbery the videotape did not show Mosley using force, violence or intimidation.

The Paterson police officer who interviewed the teller after the robbery reported that Mosley had not brandished any weapon, and that during the interview, just 16 minutes after the robbery, the teller did not appear to be upset. The teller working at the station adjacent to the teller approached by Mosley testified that she did not see or hear anything alerting her to the robbery while it was occurring.

III. DISCUSSION

As we have indicated, Mosley acknowledges that he entered the banks and took money as alleged in counts one and two of the indictment. He argues, however, that the court's refusal to charge the jury at his request that it could convict him of bank larceny eliminated his defense that his conduct did not satisfy the required elements of bank robbery.

Mosley argues that he was entitled to a charge that the jury could convict him of bank larceny as a lesser included offense because "every defendant is entitled to have his theory of the case, if it could amount to a legally sufficient defense, based upon the evidence presented at trial, fairly submitted to the jury. . . and that a trial court is bound to give the substance of the requested instruction relating to any defense theory for which there is any foundation in the evidence." Br. at 18. Thus, he relies on the general rule that "a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Matthews v.*

United States, 485 U.S. 58, 63, 108 S.Ct. 883, 887 (1988). The government, though recognizing that a defendant is entitled to a charge on a lesser included offense if justified by the evidence, urges that bank larceny is not a lesser included offense of bank robbery. It therefore contends that the district court correctly rejected Mosley's request to charge bank larceny.

The district court found that

> [t]here simply are no facts in evidence to justify a bank larceny charge. . . . Clearly, there is no basis to suggest that this money was taken with the compliance of these tellers. . . . The evidence is clear that the money was in the cash drawers. As a result of his approach to each of the tellers, they were forced, through intimidation, to retrieve the money from the cash drawers and push it at him. There is nothing to suggest that this was a larceny as that term is used in [section] 2113(a)[sic].

App. at 298.

Our approach in this case is different from that of the district court, as we decide the case predicated on the law rather than on an absence of proof to justify a larceny instruction to the jury. Fed. R. Crim. P. 31(c) permits a jury to return a verdict of guilty as to an offense "necessarily included in the offense charged." However, this rule applies only where the elements of the lesser offense are a subset of the elements of the greater offense. "Where the lesser offense requires an element not required for the greater offense, no instruction is to be given under Rule 31(c)." *Schmuck v. United States*, 489 U.S. 705, 716, 109 S.Ct. 1443, 1450 (1989). This standard involves a textual comparison, looking solely to the elements of the two offenses; inferences arising from the evidence and similarities as to the interests served by the statutes are not relevant. *Id.* at 720, 109 S.Ct. at 1452-53.

We begin, then, by looking to the text of section 2113 which provides that:

> (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence

> of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association: . . . . [s]hall be fined under this title or imprisoned not more than twenty years, or both.
>
> (b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $1,000 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or in such savings and loan association, shall be fined under this title or imprisoned not more than ten years, or both. . . .

18 U.S.C. §§ 2113(a) & (b).[2] It is obvious that the definition of bank robbery in subsection (a) does not include an element that the defendant have the "intent to steal or purloin." On the other hand, bank larceny as defined in subsection (b) includes this element. A defendant has the intent to steal or purloin if he intends permanently to deprive the rightful owner of the property. *See United States v. Goldblatt*, 813 F.2d 619, 625 (3d Cir. 1987). Thus, we must determine whether the "steal or purloin" provision is included impliedly as an element of bank robbery in subsection (a). If it is not, bank larceny includes an element not included within bank robbery and thus, under *Schmuck*, is not a lesser included offense of bank robbery.

We have held that the subjective intent of a bank robber to steal is irrelevant: "the crime is his resort to force and violence, or intimidation, in the presence of another person to accomplish his purposes." *United States v. Brown*, 547 F.2d 36, 39 (3d Cir. 1976) (citations omitted). Thus, it is "immaterial for section[ ] 2113(a) . . . whether the subjective intent of a bank robber is to steal that to which he has no claim or to recover his own deposit." *Id.* In contrast,

2. The presence of a threshhold "exceeding $1,000" in the quoted paragraph of 18 U.S.C. § 2113(b) does not add an element to the offense of bank larceny not present in bank robbery because the next paragraph of section 2113(b) imposes a less severe sentence in those cases "not exceeding $1,000."

> however, section 2113(b) specifically requires intent to steal or purloin to satisfy the elements of bank larceny. Given this holding in *Brown*, it seems clear that bank larceny cannot be a lesser included offense of bank robbery under the Supreme Court's strictures in *Schmuck*, which indicates that "offenses are statutorily defined." *Schmuck*, 489 U.S. at 71, 109 S.Ct. at 1451.

Nevertheless, while it seems clear to us that bank larceny is not a lesser included offense of bank robbery, there is a conflict among the courts of appeals on this point and, as we pointed out above, the weight of authority is against our position. In these circumstances, we review the cases from the other courts of appeals. We start with *United States v. Gregory*, 891 F.2d 732, 734 (9th Cir. 1989), which reached our result that under *Schmuck*, bank larceny is not a lesser included offense of bank robbery. *Gregory* reached this result because "[b]ank larceny . . . contains a specific intent element which need not be proved in the bank robbery context . . . . [Hence] bank larceny cannot be 'necessarily included' in bank robbery." *Id.* at 734. Thus, we are not alone in our holding on this appeal.

We are particularly impressed by the insightful discussion of the issue in *United States v. Brittain*, 41 F.3d 1409 (10th Cir. 1994). While ultimately holding that bank larceny is a lesser included offense of bank robbery, the court expressed its hesitance to do so.[3] Accordingly, notwithstanding its actual holding, we find support in the *Brittain* court's extensive analysis supporting a conclusion

3. The *Brittain* court so held because it found itself bound by its previous holdings. Yet it clearly indicated that it might not have reached its holding in the absence of binding precedent. In fact, a fair reading of *Brittain* confirms that a majority of the court believed that bank larceny is not a lesser included offense in a bank robbery case. Judge Brown, who wrote the majority opinion, made it clear that he reached the contrary conclusion only because of circuit precedent. Judge Baldock dissented on the ground that *Schmuck* rejected the reasoning in the circuit precedent. In his view, *Gregory* set forth the correct analysis under *Schmuck*. *Brittain*, 43 F.3d at 1417 (dissenting opinion). Only Judge Ebel apparently thought that, even using a *Schmuck* analysis, bank larceny was a lesser included offense of bank robbery. *Id.* at 1416 (concurring opinion).

contrary to its holding. As the *Brittain* court explained, "[f]irst and foremost, the language of §2113 calls into question [the] conclusion that bank robbery contains all the elements of bank larceny." *Id.* at 1412-13. The *Brittain* court focused specifically on the "intent to steal or purloin" element that is contained in bank larceny but not bank robbery. The decisions that find bank larceny a lesser included offense must infer that intent to steal or purloin is also an element of bank robbery. Also, while section 2113(b) requires a showing of taking and carrying away of money or property, section 2113(a) does not include the carrying away language.

The *Brittain* court also discussed the history of section 2113 to illustrate its reluctance to hold that bank larceny is a lesser included offense of bank robbery. The court recognized that there is no indication in the legislative history that Congress intended section 2113(a) to contain an "intent to steal" element identical to section 2113(b). *Id.* at 1413. The court explained that Congress initially passed the bank robbery legislation in 1934, and, though both robbery and larceny provisions were proposed, the larceny provision was deleted from the legislation. Congress added a larceny provision three years later in reaction to a case in which a man walked into a bank and, without confronting any bank employees, helped himself to $11,000. *Id.* at 1413 (citing *Bell v. United States*, 462 U.S. 356, 365 n.4, 103 S.Ct. 2398, 2403 n.4 (1982) (Stevens, J., dissenting)). Thus, the larceny statute seemed designed to address a different factual scenario than the typical bank robbery case.

We recognize that there is another conceivable reading of the development of the legislation. Inasmuch as both robbery and larceny were offenses at common law, it might be argued that Congress intended to incorporate the intent element of the common law crimes into section 2113.[4] However, there is no indication in the legislative history

4. The *Brittain* court questioned the plausibility of this argument in light of the Supreme Court's statement in *Bell v. United States*, 462 U.S. at 360, 103 S.Ct. at 2401, that the phrase "with intent to steal or purloin" in subsection 2113(b) "has no established meaning at common law." *Brittain*, 41 F.3d at 1413.

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that Congress so intended. The *Brittain* court suggested that an "intent to steal" element within the bank robbery provision would have been implied more easily from the bank robbery statute as it originally was written, as that version included an element of "feloniously" taking property. The term felonious could have been understood as including an intent requirement. *Brittain*, 41 F.3d at 1413. However, when Congress revised the criminal code in 1948, it deleted the word "feloniously" from section 2113(a). The Revisor's Notes indicate that this was considered only a "change in phraseology." *Brittain*, 41 F.3d at 1414 (citing *Prince v. United States*, 352 U.S. 322, 326 n.5, 77 S.Ct. 403, 406 n.5 (1957)). And though it seems that the deletion of "feloniously" was a result of Congress' effort to delete references to felonies and misdemeanors from the code, inasmuch as both terms were defined in 18 U.S.C. §1 (repealed), Congress' failure to give some indication that intent was to remain an element of bank robbery may provide support for the proposition that intent was not conceived as an element of the crime. *See United States v. Richardson*, 687 F.2d 952, 957 (7th Cir. 1982).

Thus, the *Brittain* court found that the history of the statute mandated against a finding that bank larceny is a lesser included offense of bank robbery. Accordingly, at most, the revisions to the criminal code provide minimal guidance as to the meaning of section 2113. For this reason, we find even more helpful to our conclusion that bank larceny is not a lesser included offense of bank robbery, the combination of both the literal words of the statute and the factual history underlying the enactment of the larceny statute.

We recognize that the Courts of Appeals for the First, Fourth, Fifth, Sixth, Eighth, Tenth and Eleventh Circuits have held, or at least indicated, that bank larceny is a lesser included offense of bank robbery. *See United States v. Henson*, 945 F.2d 430, 440 (1st Cir. 1991) (stating that "failure to instruct on the lesser charge of bank larceny" not plain error); *United States v. Carter*, 540 F.2d 753, 754 (4th Cir. 1976) (holding that court must instruct jury on lesser included offense of bank larceny where there is factual dispute as to existence of force and violence or intimidation

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but affirming because evidence did not require larceny instruction); *United States v. Walker*, 75 F.3d 178 (4th Cir.) (same), *cert. denied*, 116 S.Ct. 2513 (1996); *United States v. Flint*, 534 F.2d 58, 60 (5th Cir. 1976) (affirming district court's refusal to give instruction on lesser included offense of bank larceny because there was no factual dispute as to the presence of intimidation or violence but indicating that bank larceny is a lesser included offense in a bank robbery indictment); *United States v. Perry*, 991 F.2d 304, 307 (6th Cir. 1993) ("[T]he court declined to instruct the jury on the lesser included offense of bank larceny, 18 U.S.C. § 2113(b)."); *United States v. Cady*, 495 F.2d 742, 747-48 (8th Cir. 1974) (recognizing that bank larceny is a lesser included offense of bank robbery under section 2113); *United States v. Brittain*, 41 F.3d 1409; *United States v. Comillie*, 92 F.3d 1108, 1110 (11th Cir. 1996) (acknowledging, without discussion, that bank larceny is a lesser included offense of bank robbery).[5] In our view, these opinions are not consistent with the methodology of *Schmuck*. Therefore, we reject the majority view that bank larceny is a lesser included offense of bank robbery.

IV. CONCLUSION

In view of the aforesaid, we hold that the district court's refusal to grant Mosley's request for a jury instruction on bank larceny was proper as bank larceny is not a lesser included offense of bank robbery.[6] We accordingly will

5. The Court of Appeals for the Seventh Circuit has conflicting holdings on this issue. In 1969, the court held that "[t]his is not an instance of 'lesser-included offense' which would have entitled defendant to the jury instruction he sought, since the commission of either crime is made unlawful by the same statutory section and one is not 'lesser' than the other." *United States v. Hephner*, 410 F.2d 934 (7th Cir. 1969). In contrast, the court held in 1996 (without reversing or even commenting on the earlier holding) that "[a]s an element of the crime of bank robbery, 18 U.S.C. § 2113(a), the government must prove that the accused committed the crime by force and violence, or by intimidation. This element is missing from the lesser included crime of bank larceny under 18 U.S.C. § 2113(b)." *United States v. Sandles*, 80 F.3d 1145, 1147 n.1 (7th Cir. 1996).

6. We recognize that our result will mean that if a jury concludes that a defendant did not use force and violence or intimidation in a bank

affirm the conviction and sentence of the district court entered December 11, 1996.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

robbery case, but nevertheless intended to steal or purloin the property or money, it must acquit the defendant if the indictment is only for bank robbery. We, however, express no view on whether a grand jury may indict a defendant for both bank robbery and bank larceny by reason of a single incident, as that issue is not involved here. Finally, we note that Mosley does not contend that the evidence cannot support the bank robbery conviction on count one.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAMBERS OF
ALFRED J. LECHNER, JR.
JUDGE

MARTIN LUTHER KING JR.
FEDERAL BUILDING & U.S. COURTHOUSE
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21 January 1997

NOT FOR PUBLICATION

LETTER-OPINION
ORIGINAL FILED WITH THE CLERK OF THE COURT

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ORIGINAL FILED
JAN 21 1997
WILLIAM T. WALSH, CLERK

Re: United States v. Sylvester Mosley
Criminal Action No. 96-12 (AJL)

Counsel:

A two count indictment (the "Indictment") was filed on 4 January 1996 against the defendant, Sylvester Mosley ("Mosley"). Both counts of the Indictment charged Mosley with bank robbery, in violation of 18 U.S.C. § 2113(a).[1] On 5 March 1996, following

[1] Section 2113(a) provides, in relevant part,

> Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management or possession of, any bank, credit union, or any savings and loan association ... shall be fined under this title or imprisoned not more than twenty
> (continued...)

a jury trial, Mosley was found guilty on both counts. Mosley filed a notice of motion for a new trial, pursuant to Fed.R.Crim.P. 33 (the "Motion for a New Trial"), and for judgment of acquittal, pursuant to Fed.R.Crim.P. 29 (the "Motion for Acquittal").[2]

Mosley is subject to a maximum prison sentence of twenty years for violation of 18 U.S.C. § 2113(a). See 18 U.S.C. § 2113(a). The presentence investigation report (the "Presentence Report") classified Mosley as a career offender. Presentence Report, ¶ 57. The Presentence Report stated that, pursuant to the United States Sentencing Guidelines (the "Guidelines") and

[1](...continued)
years, or both.

18 U.S.C. § 2113(a).

[2] On 5 March 1996, Mosley moved for judgment of acquittal following the close of evidence at trial. That motion was denied.

On 12 March 1996, Mosley filed Notice for the instant Motion for a New Trial and Motion for Acquittal. Mosley indicated he would be submitting a memorandum of law in support of the motions. See Notice of Motion, filed 12 March 1996. Mosley filed his memorandum of law on 20 November 1996. See, infra, note 5 for description of submissions.

The Government response was filed 26 November 1996. See, infra, note 5 for description of submissions.

"based on a total offense level of 32 and a criminal history category of VI, the guideline range for imprisonment is 210 to 262 months." Presentence Report, ¶ 158.[3]

Mosley did not object to his classification as a career offender. See Sentencing Transcript ("Sentencing Tr.") 10-11. Mosley, however, moved for a downward departure pursuant to 18 U.S.C. § 3553 and U.S.S.G. §§ 5K2.0 and 5H1.4 based upon his physical condition (the "Motion for Downward Departure"). Mosley is HIV positive and has Acquired Immune Deficiency Syndrome ("AIDS"). Mosley was sentenced on 9 December 1996.[4] For the reasons set forth below, the Motion for a New Trial, the Motion for Acquittal and the Motion for Downward Departure were denied.[5]

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[3] The Government did not object to the recommendations of the Presentence Report if Mosley was sentenced as a career offender. If Mosley was not sentenced as a career offender, however, the Government requested an upward departure based upon Mosley's inadequate criminal history. Because Mosley did not object to his career offender status either in his pre-sentencing submissions or at sentencing, it is not addressed in this opinion.

[4] The sentencing was originally scheduled for 30 May 1996, but was adjourned upon the request of counsel for Mosley. The filing of this opinion was delayed because the sentencing transcript could not be obtained until 3 January 1997.

[5] In support of his motions, Mosley submitted: Defendant's Memorandum of Law in Support of Defendant's Motions for a New Trial, Pursuant to (continued...)

Facts

On 9 November 1995, the Paterson branch of the First Fidelity Bank was robbed by an unknown black male, who was approximately 60 years old and "homeless looking." See Trial Transcript ("Tr."), 133, 145. The bank robber approached a teller, held up a note reading "HOLD UP," in capital letters and, in a demanding tone, directed the teller to give him all her large bills. Tr. 134-38. The teller attempted to give the bank robber bait money,[1] but he proceeded to throw it back. Tr. 135. The teller handed the bank robber $2,547.30 in unmarked currency

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[5] (...continued)
Fed.R.Crim.P. 33 and for a Judgment of Acquittal as to Count II of the Indictment, Pursuant to Fed.R.Crim.P. 29(c) ("Defendant's Motion Brief"), with Exhibits A through B attached; 20 November 1996 Letter Brief in Support of Downward Departure ("Defendant's Departure Brief"), with Exhibits A through B attached.

In opposition to the motions, the Government submitted: Memorandum of the United States in Opposition to Defendant Sylvester Mosley's Motions for (1) A New Trial, (2) A Judgment of Acquittal on Count Two of the Indictment and (3) A Downward Departure in Sentence ("Government's Opposition Brief"). The Government also submitted a letter brief, dated 6 September 1996, in support of upward departure if Mosley was not sentenced as a career offender.

[1] Bait money is security money with serial numbers on it that can be traced if used. Tr. 135.

and he quickly walked away. Tr. 136; Presentence Report, ¶ 11. The teller testified that throughout the incident she felt very scared and nervous. Tr. 134. After the bank robber left the bank, the teller informed her supervisor that she had been robbed. Tr. 137. Pursuant to a photo line-up, which occurred on 15 November 1995, the teller identified Mosley as the person who robbed her.[7] Presentence Report, ¶ 12.

On 20 November 1995, the Federal Bureau of Investigation (the "FBI") was notified of a second bank robbery, which occurred at another branch of the First Fidelity Bank in Paterson. Id., ¶ 13. The teller involved in that incident later identified Mosley from a photo line-up as the bank robber. Id., ¶ 15.

The teller testified Mosley approached her and stated: "This is a hold-up.... Open your bottom drawer and give me all the big bills, start with the big bills first." Tr. 107. The teller testified that Mosley gestured to his coat as if he had a weapon. Id. at 107-108. After handing over $9,334.81, the teller told Mosley she had to go to the bathroom, locked her teller drawer, and began walking to the bathroom where she "urinated uncontrollably due to fear." Presentence Report, ¶ 14. The

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[7] The 9 November 1995 incident constitutes Count II of the Indictment.

teller testified she felt nervous and frightened.[8] Tr. 107, 111.

In post-arrest statements, Mosley implicated two other individuals: Ronald Hammond, who was involved in the 9 November 1995 bank robbery, and Gerald Woodhouse, who was involved in the 20 November 1995 bank robbery. Presentence Report, ¶¶ 16-19. Neither Hammond nor Woodhouse was charged. Id., ¶ 21.

A. Motion for New Trial

Mosley filed a notice of motion for a new trial, pursuant to Fed.R.Crim.P. 33 ("Rule 33").[9] Discretion is employed in the decision of whether to grant a new trial. Government of Virgin Islands v. Lima, 774 F.2d 1245, 1250 (3d Cir. 1985); United States v. Adams, 759 F.2d 1099, 1108 (3d Cir.), cert. denied, 474 U.S. 971 (1985); United States v. Bujese, 371 F.2d 120, 124-25 (3d Cir. 1967).

A court may grant a new trial pursuant to Rule 33 if it is so required in the interest of justice. Rule 33. The grant of a new trial is appropriate when failure to do so would result in an

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[8] The 20 November 1992 incident constitutes Count I of the Indictment.

[9] Rule 33 provides, in relevant part, that

> The court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice.

Rule 33.

injustice. Mosley submits a new trial is appropriate because of the admission of certain evidence which "was relevant only, for the impermissible purpose[], of proving 'criminal disposition'...." Defendant's Motion Brief at 5-6. Mosley contends this evidence was unduly prejudicial. Id. at 6.

Mosley objected to the admission of Government Exhibit 118 "Exhibit 118"). This exhibit referenced an earlier conviction of Mosley for a 1991 robbery of the same First Fidelity Bank alleged in Count II of the Indictment. Government's Opposition Brief at 3. Mosley entered a plea of guilty to this charge in October 1993. Defendant's Motion Brief at 3. Exhibit 118 consists of three pages and indicates the following:

> Count I - Custody of the Commissioner of the Department of Corrections for [seven] years. Said sentence to run concurrent with violation of probation. SCCP $75.00. Said sentence to run concurrent with sentence on 91-06-0980.
>
> ...
>
> Aggravating Factors: Risk that defendant will commit another offense.
> Extent of defendant's prior criminal record.
> Need for deterring defendant and others.
>
> Mitigating Factors: None[.]

See Exhibit 118, attached as Exhibit A to Defendant's Motion Brief and Government's Opposition Brief.

Before trial in the instant matter, the Government moved for an in limine ruling on the admissibility of Exhibit 118. Decision was reserved until the time at which Exhibit 118 was to be offered. Tr. 4-8. At trial, Mosley objected to the admission of Exhibit 118 pursuant to Fed.R.Evid. 404(b) ("Rule 404(b)") and Fed.R.Evid. 403 ("Rule 403"), on the ground that the connection was "five years old, it's remote, it's not relevant... and the prejudice has the potential to overwhelm any appropriateness as to what [Mosley] may have done five years ago." Tr. 152-53.

Exhibit 118 was found to be admissible. Tr. 153-154. It was determined that Exhibit 118 was "not used for an improper purpose under 404(b).... [but] to demonstrate one of the elements of the offense, that being ... the purpose to intimidate ... as required by the statute." Tr. 153. Under Rule 403, Exhibit 118 was found to be probative, but not unfairly prejudicial. Tr. 153-54 ("It certainly is not unfairly prejudicial and the probative value far exceeds any possible undue prejudice.").

"[A]ll relevant evidence is admissible." See Fed.R.Evid. 402; United States v. Murray, ___ F.3d ___, 1997 WL 1891, *5 (3d Cir. 3 Jan. 1997). Evidence is relevant if it tends "to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be

without the evidence." Fed.R.Evid. 401; Murray, 1997 WL 1891, at *5. The admissibility of certain categories of relevant evidence is limited, however, by Rule 404(b).

Rule 404(b) states that

> Evidence of other crimes ... is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident ....

Rule 404(b). Rule 404(b), "viewed as a rule of inclusion rather than exclusion, provides for the exclusion of relevant evidence in certain situations." United States v. Sriyuth, 98 F.3d 739, 745 (3d Cir. 1996) (citing Huddleston v. United States, 485 U.S. 681, 688-89 (1988); United States v. Scarfo, 850 F.2d 1015, 1019 (3d Cir.), cert. denied, 488 U.S. 910 (1988)); United States v. Long, 574 F.2d 761, 766 (3d Cir.), cert. denied, 439 U.S. 985 (1978). Evidence of other crimes, wrongs, or acts offered to prove only that the defendant acted in conformity with those acts must be excluded. If the evidence "was relevant to prove anything else, Rule 404(b) [does] not preclude its admission." Murray, 1997 WL 1898, * 5; Sriyuth, 98 F.3d at 745; United States v. Trains, 871 F.2d 368, 389 (3d Cir.), cert. denied, 493 U.S. 821 (1989).

In Huddleston, the Supreme Court set forth four factors

relevant to determine the admissibility of evidence under Rule 404(b):

> (1) the other crimes evidence must have a proper purpose; (2) the proffered evidence must be relevant under Fed.R.Evid. 104(b); (3) its probative value must outweigh its potential for unfair prejudice under Rule 403 balancing; and (4) the court must charge the jury to consider the other crimes evidence only for the limited purpose for which it is admitted.

Huddleston, 485 U.S. at 691-92.

"The threshold inquiry a court must make before admitting similar acts evidence under Rule 404(b) is whether that evidence is probative of a material issue other than character." Sriyuth, 98 F.3d at 745 (citing Huddleston, 485 U.S. at 686). Once it has been determined that the other crimes evidence is admissible under Rule 404(b), the balancing test of Rule 403 must also be met. Id. "[R]elevant other crimes evidence may be excluded if the probative value of the evidence is substantially outweighed by the danger of undue prejudice." Id. (citing Scarfo, 850 F.2d at 1019 (citation omitted)). The subtle distinction between what is permissible and what is prohibited, as well as the substantial potential of unfair prejudice, requires the exercise of particular care in employing this analysis.

Mosley conceded that he was the individual at the banks. Tr. 152. At issue was whether Mosley intended to use fear or intimidation to take the money. Id. Exhibit 118 demonstrated

that, on previous occasions, Mosley had used intimidation to commit bank robbery. This was probative of his intent, a requisite element of the charges against him. Exhibit 118 was, therefore, appropriately admitted into evidence. Cf. United States v. Himelwright, 42 F.3d 777, 784 (3d Cir. 1994)("in order to admit evidence under the "intent" component of Rule 404(b), intent must be an element of the crime charged and the evidence offered must cast light upon the defendant's intent to commit the crime."') (citing United States v. Kirk, 528 F.2d 1057, 1060 (5th Cir. 1976)); United States v. Hudson, 843 F.2d 1062, 1067 (7th Cir. 1988)(identification of defendant in robbery that occurred twelve days earlier was admissible to prove intent under four part test established by Seventh Circuit;[11] two larcenies were

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[11] The Seventh Circuit test requires

> (1) the evidence is directed toward establishing a matter in issue other than the defendant's propensity to commit the crime charged, (2) the evidence shows that the other act is similar enough and close enough in time to be relevant to the matter in issue ..., (3) the evidence is clear and convincing, and (4) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.

United States v. Rollins, 862 F.2d 1282, 1294 (7th Cir.), cert. denied, 490 U.S. 1074 (1989). The Supreme Court invalidated the third prong of the test in Huddleston. Id. (citing 485 U.S. at 685).

similar and close enough in time to be relevant of intent."); United States v. McCallum, 703 F.2d 1419, 1427 & n.7 (9th Cir.)(evidence of prior bank robbery conviction admissible to prove intent to commit bank robbery under Rule 404(b) and 609), cert. denied, 469 U.S. 920 (1984).

Mosley alternatively contends the statements in Exhibit 118 were unduly prejudicial pursuant to Rule 403 because they revealed to the jury that Mosley was charged with committing a prior bank robbery, Mosley pleaded guilty to the charge, another judge ordered incarceration for seven years, Mosley had violated a prior probationary sentence and Mosley had been sentence to imprisonment for another crime. Defendant's Motion Brief at 5; Sentencing Tr. 4. Mosley did not offer these reasons when he argued against the admission of Exhibit 118 at trial. See Sentencing Tr. 4-6.

In addition, Mosley also now contends the language in Exhibit 118 regarding the aggravating factors, and lack of mitigating factors, was unfairly prejudicial. Mosley now argues it was prejudicial to admit the exhibit which stated there was a "risk that [Mosley] will commit another offense," referred to "[Mosley's] prior criminal record," and suggested the "need for deterring [Mosley] and others." Defendant's Motion Brief at 6; Sentencing Tr. 5. Exhibit 118 also states that there are no

mitigating factors to be considered in sentencing Mosley. Id. Mosley asserts the "inferences to be gleaned from ... Exhibit 118 deal purely with [the] propensity to commit crimes...." Defendant's Moving Brief at 6; Sentencing Tr. 5-6.

None of this language was objected to when the document was offered into evidence at trial -- nor at any other time before this post-trial motion was filed. At trial, Mosley objected only on the ground that Exhibit 118 was too remote in time and, therefore, was unduly prejudicial pursuant to Rule 404(b) and Rule 403. Mosley did not object to the content of Exhibit 118, but rather argued that because it concerned an event that occurred five or six years earlier, it was not relevant. Tr. 152. Accordingly, the Government contends this objection on the content of Exhibit 118 is untimely and, therefore, waived. Government's Opposition Brief at 4-6. The Government submits that, if Mosley had objected to its content earlier, the Government would have agreed to admit Exhibit 118 in redacted form. Id. at 6. In substance, the Government argues Mosley made a tactical decision at trial to limit his objection and, therefore, the other objections are waived.

Fed.R.Evid. 103(a)(1) ("Rule 103") required Mosley to make a

timely objection.[11]

> The requirement of a timely objection promotes judicial economy by enhancing the trial court's ability to remedy the asserted error. If a party fails to object in a timely fashion, the objection is waived and we will review the admission of evidence only for plain error.

Government of Virgin Islands v. Archibald, 987 F.2d 180, 184 (3d Cir. 1993)(citing United States v. Young, 470 U.S. 1, 13-14 1985); United States v. Warr, 793 F.2d 551, 555 3d Cir. 1986)).

A party must raise an objection as soon as the party knows or reasonably should know of the grounds for objection. Id. (citing United States v. Gibbs, 739 F.2d 838, 849 (3d Cir. 1984) (in banc), cert. denied, 469 U.S. 1106 (1985)). Where party fails to make timely objection to an evidentiary ruling, review of that ruling is for plain error. Fed.R.Evid. 103(d); United States v. Leo, 941 F.2d 181, 193 (3d Cir. 1991). "Plain errors are those errors that 'seriously affect the fairness, integrity

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[11] Mosley argued at sentencing that "he did not recite the exact language" to which he now objects, but, rather, that his "objection was a general objection." Sentencing Tr. 5. Rule 103(a)(1) states,

> In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context.

Rule 103(a)(1) (emphasis added).

or public reputation in judicial proceedings.'" Lee, 941 F.2d at 193 (citations omitted).

Mosley was provided a copy of Exhibit 118 in pre-trial discovery. Government's Opposition Brief at 5. Mosley was also given a copy of Exhibit 118 in the submissions of the Government in support of its pre-trial motion to admit it into evidence. Id. Mosley was on notice of the contents of Exhibit 118 prior to its admission at trial. Id. As explained, Mosley objected only on the ground that it was too remote in time. Id. Mosley never objected to specific language of Exhibit 118 and did not request that Exhibit 118 be admitted in redacted form.[12]

Assuming the objection was timely presented, however, the admission of Exhibit 118 was not erroneous or unduly prejudicial. As discussed above, the evidence was admitted for a proper purpose -- to prove intent. If admission of Exhibit 118 should have been admitted in redacted form, that error was harmless and did not affect the judgment of the jury.

As discussed, Mosley conceded to being the individual at the bank who took the money from the tellers. Tr. 152. Other evidence connects Mosley to the bank robbery -- photographs,

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[12] Although Mosley repeated his objection to Exhibit 118 later in the trial, see Tr. 194, the objection failed to focus attention on the language in the exhibit.

testimony of both tellers and a confession. Government Brief at 7. Exhibit 118 was offered to demonstrate Mosley's intent to intimidate. Tr. 153.

There was neither testimony nor comment as to the portion of Exhibit 118 that Mosley now places in issue. No portion of Exhibit 118 that is now objected to by Mosley was referenced in closing arguments.[13] Exhibit 118 was sent to the jury at the close of the case with other exhibits.

Based on the extensive inculpatory evidence presented, it is highly improbable that Exhibit 118 improperly contributed to the conviction by the jury because of the language to which Mosley now objects. See United States v. Sokolow, 91 F.3d 396, 407 (3d Cir. 1996)(quoting United States v. Simon, 995 F.2d 1236, 1244 (3d Cir. 1993)) "Trial error is harmless if it is highly probable that the error did not affect the judgment."). Cf. United States v. Casoni, 950 F.2d 893, 918 (3d Cir. 1991)(citing Government of Virgin Islands v. Toto, 529 F.2d 278, 284 (3d Cir.

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[13] Mosley submits Exhibit 118 was highlighted in the Government's closing argument, which stated, in part, "Again, the Government has placed into evidence [E]xhibit 118, which is a judgment of conviction in this case and you'll have the chance to examine it." Tr. 283. Although the Government referenced Exhibit 118 in closing argument, the language of the exhibit to which Mosley now objects was neither quoted nor referenced.

1976).

In addition, during jury selection,[17] Tr. 51-52, and in the charge to the jury,[18] Tr. 327-28, the jury was cautioned to use

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[17] During jury selection, the following inquiry was posed to the jurors,

> [Y]ou may learn during the course of this trial that the defendant has been previously convicted of a crime. That evidence will be offered to show the intent of the defendant in committing the crimes with which he is charged in this case. It's proper to use such evidence only to decide whether the defendant intended to intimidate the bank tellers in order to take the money from the bank. Such evidence can be used only for a limited purpose.
>
> It may not be used to conclude the defendant is a bad person or that he was predisposed to do a bad thing. Is there anyone among you who would not be able to follow such instruction or who would feel that because of a previous criminal conviction, the defendant is more likely to have committed the crimes charged in this case?

Tr. 51-52.

[18] The following pre-deliberation jury instruction was also given to the jury,

> Now, the United States has offered evidence that Mr. Mosley was convicted of a bank robbery in the past. This evidence was presented during the testimony of a witness and introduced through that judgment of conviction which you will have with you in the jury room. This has been offered to show
>
> (continued...)

the evidence only for the specific purpose of proving intent. The jury is presumed to have followed the instruction. See United States v. DiSalvo, 34 F.3d 1204, 1223 (3d Cir.

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[18](...continued)

> the defendant's intent in committing the crimes with which he has been charged.
>
> With respect to the prior conviction, the United States has offered this evidence to prove that the defendant knowingly and willfully used intimidation to take from a teller money belonging to and in the care, custody, control, management and possession of the First Fidelity Bank on the 9th of November, and November 20, 1995. It's the position of the United States that this conviction, as well as other pieces of evidence, demonstrate Mr. Mosley's intent to intimidate the bank tellers at the time of the crimes charged.
>
> Now, it's proper to use this evidence to decide whether or not Mr. Mosley intended to intimidate the bank tellers. Should you chose to believe the evidence presented about the defendant's prior conviction for bank robbery, I caution you, you may use it only — you may use and consider this evidence only for the limited purpose I just described.
>
> You may not use it to conclude the defendant is a bad person or that he was predisposed to do bad things. Therefore, you should only consider this evidence for the purpose ... I just discussed with you and in conjunction with these instructions. I stress, to consider the evidence for any other purpose would be improper.

Tr. 327-28.

1994)(citations omitted).

Based on the totality of the evidence presented in this case and the jury instruction given (to which no objection was offered), it is speculative, at best, to conclude the jury was improperly influenced by the portions of Exhibit 118 objected to by Mosley. The Motion for a New Trial was denied at sentencing. Sentencing Tr. 8.

B. Judgment of Acquittal

Following the close of evidence on 5 March 1996, Mosley moved for judgment of acquittal as to both counts of the Indictment on the ground that there was insufficient evidence to establish the elements for either charge of bank robbery. Tr. 254. Mosley argued the evidence was insufficient for a jury to find that Mosley intended to take the money by force, violence or intimidation. See Tr. 254-62. The motion for acquittal was denied at that time. Tr. 261. It was determined there was sufficient evidence to support the jury finding of intimidation. Id. at 261-262.

The instant Motion for Acquittal, filed by Mosley within seven days of the verdict,[6] returned to the issue of whether the

[6] As noted, Mosley did not file a brief in support of the Motion for Acquittal, or the Motion for New Trial until 20 November 1996. See, supra, (continued...)

Government established, beyond a reasonable doubt, each element of the crime as to Count II of the Indictment (the 9 November 1995 Bank Robbery). Defendant's Motion Brief at 8. Mosley argued the Government failed to prove the use of "force and violence, or by intimidation" to commit the robbery as required by 18 U.S.C. § 2113(a). Id. at 9.

In deciding whether a judgment of acquittal should be rendered, it must be determined whether, "viewing the evidence in a light most favorable to the government, there was substantial evidence" to support the finding of the jury of guilt beyond a reasonable doubt as to each element of the crime charged. See Sriyuth, 98 F.3d at 750 (citations omitted); United States v. Pecora, 798 F.2d 614, 618 (3d Cir. 1984), cert. denied, 479 U.S. 1064 (1987) (citing Government of the Virgin Islands v. Williams, 739 F.2d 936, 940 (3d Cir. 1984)); see also United States v. Objalo, 23 F.3d 69, 71-72 (3d Cir. 1994)(citing United States v. Pungitore, 910 F.2d 1084, 1128-29 (3d Cir. 1990), cert. denied, 500 U.S. 915 (1991)); United States v. Rieger, 942 F.2d 230, 232 (3d Cir. 1991). "The Government must be given the benefit of inferences that may be drawn from the evidence, and the evidence may be considered probative even if it is circumstantial." Id.

[6](...continued) note 2.

Mosley argued the Government did not prove force, violence or intimidation with regard to the 9 November 1995 Bank Robbery. In support of this argument, Mosley referred to the testimony of the teller. The teller testified she never told the police or the FBI during their investigation that she saw a weapon; she also testified Mosley's hands were visible to her. Tr. 142.

The teller testified the incident only lasted five seconds and that Mosley appeared to be homeless, had bags under her eyes and appeared to be 60 years old. Tr. 143, 145.

Mosley also referred to the testimony of FBI Special Agent John Conway ("Conway"). Conway testified he arrested Mosley, Tr. 161, he discussed the allegations in the case with Mosley, Tr. 166, and he wrote a detailed report of the interview of Mosley. Tr. 166-167. Conway testified the report contained nothing about force, violence or intimidation on the part of Mosley. Tr. 168-69.

Conway also testified as to the contents of a bank surveillance videotape which recorded the 9 November 1995 Bank Robbery. Tr. 190-202. Conway testified Mosley displayed both hands to the teller and the videotape did not reveal any evidence of violence or force on the part of Mosley during the four or five seconds that the incident occurred. Tr. 200-203. Mosley also argued there was no testimony that the videotape revealed

evidence of intimidation. Defendant's Motion Brief at 10 (citing Tr. 203).

The evidence, when viewed in the light most favorable to the Government, however, does reveal sufficient evidence to support the jury's finding of guilt. Mosley argued only what certain evidence did not show, not what other evidence did show.

The teller testified she felt "very scared and nervous" when Mosley held up the sign that read "HOLD UP" written in capital letters. Tr. 134. She testified that, when he asked for the money, his tone was demanding. Tr. 135. The teller did not activate the bank alarm and complied with Mosley's directive. Tr. 135. The teller testified she tried to give him bait money and felt scared when Mosley threw it back at her. Tr. 135-36. The teller also testified she felt scared immediately after the robbery when Mosley left the bank. Tr. 134, 137.

Although Conway testified the bank surveillance videotape did not reveal any force or violence employed by Mosley, Conway did not say the silent videotape was void of evidence of intimidation. Tr. 202-203.

The evidence demonstrated Mosley was convicted of bank robbery five years earlier. Tr. 160-161. This was evidence of intent. Tr. 261. Mosley told the FBI on the day of his arrest that he had robbed the bank, which was evidence of his intent and

understanding, Tr. 136-137, especially in light of his prior involvement with the criminal justice system. In addition, the evidence of intimidation in the Count I robbery "sheds light on his intent to use intimidation in the Count II robbery." Government's Opposition Brief at 11.

In photographic evidence presented in support of Count I, Mosley was depicted as using his hand in his jacket, creating the impression that he was carrying a gun. Tr. 261-262. The teller, testifying as to Count I, stated that Mosley had "gestured to his coat as if he had something there." Tr. 107, 108.

The jury instruction provided a clear framework for the jury to determine the existence or absence of intimidation." Tr.

" The instruction to the jury provided, in relevant part,

> Let me talk to you about the term "by force and violence or by intimidation." Let me define it for you.
>
> That means either, one, the use of actual physical strength or actual physical violence or two, doing some act or making some statement to put someone in fear of bodily harm.
>
> The requirement of taking by force and violence or by intimidation under Section 2113(a) is disjunctive. The Government need only prove force and violence or intimidation to establish this case. It does not have to prove both.

(continued...)

330-331. Mosley did not object to this instruction. The described evidence, together with the jury instruction, was sufficient to support a finding by the jury of guilt as to Count. II of the indictment. The Motion for Acquittal was denied at sentencing. Sentencing Tr. 10.

" ...continued:

> The Government contends in this case that the taking of money was by intimidation. If you so find beyond a reasonable doubt that the money was taken by intimidation, this element of the offense is satisfied.
>
> Now, the word "intimidation" must be caused by an act knowingly and deliberately done and a statement knowingly and deliberately made, willfully made by the defendant or made in such a manner or under the circumstances that would produce such a reaction or such a fear of bodily harm in a reasonable person.
>
> The United States does not have to prove that the behavior of Mr. Mosley was so violent that it was likely to cause terror, panic, hysteria. Further, the United States does not have to prove that the alleged victim was actually frightened.
>
> A taking would not be by means of intimidation, however, if fear on the part of the alleged victim resulted from that person's own timidity rather than from some intimidating conduct on the part of Mr. Mosley. The essence of the offense is the taking of money or property, aided and accompanied by an intentional intimidating behavior on the part of the defendant.

Tr. 330-31.

C. Section 5H1.4 Departure.[18]

Mosley has AIDS. Mosley has requested a downward departure pursuant to 18 U.S.C. § 3553(b) and U.S.S.G. §§ 5H1.4, 5K2.0[19] Defendant's Departure Brief at 1. Under U.S.S.G. § 5K2.0, a departure from the applicable guideline range may be appropriate if "'there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.'" U.S.S.G. 5K2.0. See also United States v. Schein, 31 F.3d 135, 138 (3d Cir. 1994).

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18 Mosley made several objections to the Presentence Report which do not affect the calculation of the sentencing guidelines. See 3 December Letter of McCauley to Probation Officer (not submitted to the court). Accordingly, they were not considered at sentencing and are not discussed in this opinion.

19 Section 5K2.0 states, in relevant part,

> Under 18 U.S.C. § 3553(b) the sentencing court may impose a sentence outside the range established by the applicable guideline, if the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."

U.S.S.G. § 5K2.0

Section 5H1.4 states,

> Physical condition or appearance, including physique, is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range. However, an extraordinary physical impairment may be a reason to impose a sentence below the applicable guideline range; e.g. in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment.

U.S.S.G. § 5H1.4.

The Third Circuit has not addressed the specific issue of whether a downward departure is justified when sentencing a defendant who is inflicted with AIDS. Other courts which have encountered the issue, however, have denied a downward departure because the condition of the defendant, when sentenced, did not constitute an "extraordinary physical impairment." See United States v. Rabins, 63 F.3d 721, 727-28 (8th Cir. 1995), cert. denied sub nom., ___ U.S. ___, 116 S.Ct. 1031.

In Rabins, the Eighth Circuit found a departure for a defendant who has AIDS was not warranted because, at the time of sentencing, the virus had not "progressed to such an advanced stage that it could be characterized as an 'extraordinary physical impairment.'" 63 F.3d at 728 (citation omitted). The sentencing court considered the defendant's medical records, his testimony concerning his physical condition, the representations of his attorney concerning his physical condition, and his

physical appearance. Id. Based upon these factors, the court determined that no extraordinary physical condition existed. Id. (noting that record was devoid of evidence to demonstrate defendant was taking medication, that prison would worsen his condition or that he required special care).

In United States v. Woody, 55 F.3d 1257 (7th Cir.), cert. denied, ___ U.S. ___, 116 S.Ct. 234 (1995), the defendant, who was not inflicted with "full blown AIDS," failed to present a "sound factual foundation which would support a downward departure for his HIV positive condition." Id. at 1276. See also United States v. Thomas, 49 F.3d 253, 261 (6th Cir. 1995)("AIDS affliction warrants sympathy, but not a departure")(citation and quotations omitted); United States v. DePew, 751 F.Supp. 1195, 1199 (E.D.Va. 1990)(recognizing that the Bureau of Prisons is equipped to handle the medical requirements of the defendant and stating that "terminally ill persons who commit serious crimes may not use their affliction to escape prison"), aff'd, 932 F.2d 324 (4th Cir.), cert. denied, 502 U.S. 873 (1991).

Whether the AIDS virus has advanced to a state warranting a downward departure is a question of fact left to the discretion of the sentencing court. United States v. Strear, 22 F.3d 109,

112 (6th Cir. 1994)(remanding case for factual determination).[28]

Mosley argued the cases which have denied downward departure are inherently flawed. Defendant's Departure Brief at 3. Mosley contended the language employed by the courts demonstrated a limited understanding of the AIDS virus and its health ramifications. Id. Mosley argued that the courts fail to define what is meant by advanced AIDS and ignored the "significant risk factors of an extended incarceration to an HIV-positive individual." Id. Mosley argued the holdings are inconsistent with precedent that allows a sentencing court to downward depart under U.S.S.G. § 5H1.4, even where the physical condition is not life threatening. Id. citing United States v. Greenwood, 928 F.2d 645, 646 (4th Cir. 1991)(downward departure where defendant had lost both of his lower legs); United States v. Little, 736 F.Supp. 71 (D.N.J., aff'd, 919 F.2d 137 (3d Cir. 1991)(downward

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[28] On remand, the court found that the defendant's condition warranted a downward departure to time served. United States v. Strear, 893 F.Supp. 754, 757 (N.D.Ohio 1995). The court, however, refused to depart because it determined that a departure would be inhumane. The court found the defendant had "no assets, no medical insurance or coverage, and no relatives or friends on whom he could rely for comfort during his final days." Id. The court stated: "a downward departure in this case would result in ... leaving [the defendant] to die on the streets without anyone to whom he could turn for assistance or support." Id.

departure due to defendant's chronic pulmonary condition]).[22]

Mosley contended that blood tests reveal a severe decrease in his CD4 count to below 200. At sentencing, counsel for Mosley stated that his most recent blood test revealed a level of 74.[23] See Sentencing Tr. 11. The National Center for Disease Control (the "CDC") has recently expanded its definition of AIDS to include an individual with a CD4 count of 200 or less. Defendant's Departure Brief at 4; but see Streat, 893 F.Supp. at 756 & n.2 (recognizing that, given the scope of the definition of the disease, "[i]t is conceivable that a defendant may satisfy the CDC definition of AIDS without satisfying the burden presented by the Sentencing Guidelines").

Mosley argued that the overcrowded conditions at the prison

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[22] The facts of those cases are distinguishable from the instant matter. In Greenwood, the defendant, convicted of one count of possession of a firearm by a convicted felon, had also received a two level reduction for acceptance of responsibility. In Little, the defendant was convicted of a misdemeanor offense of embezzlement and received a two month prison sentence. The required period of incarceration was a period of six to twelve months.

[23] Mosley submitted the results of two blood tests, which he attached to the Defendant's Departure Brief as Exhibit A. The latest test indicates a CD4 level of 79 on 29 August 1996. See Exhibit A, attached to Defendant's Departure Brief.

facilitate infectious disease, making him susceptible to infection, especially given "the current resurgence of tuberculosis and ... multi-drug resistant tuberculosis ("MDR-TB")." Defendant's Departure Brief at 6, Exhibit B. Mosley further argued the difficulty in detection and treatment of MDR-TB in HIV-positive individuals pose a serious health risk. Id. at ". Accordingly, Mosley requested a downward departure.

The Government opposed the request on the ground that departure is only available in the presence of extraordinary physical impairment. Government Brief at 13 (citations omitted). The Government argued Mosley has not fulfilled his burden and further argued that, "as bad as prison is, [when Mosley] was arrested, he was homeless, he was using drugs and ... more vulnerable healthwise under those circumstances than if ... in prison." Sentencing Tr. 13.

Mosley appears to suggest any defendant who is afflicted with "full-blown AIDS has an 'extraordinary physical condition' within the meaning of U.S.S.G. § 5H1.4." Defendant's Departure Brief at 4. Once that is determined, Mosley argues "[t]he inquiry ... becomes whether the individual defendant's health risks involved in extended incarceration are too great." Id.

If adopted, the practice suggested by Mosley would seriously affect the deterrent effect of incarceration. To hold that every

Defendant inflicted with AIDS has an extraordinary physical condition within the meaning of U.S.S.G. § 5H1.4, would contravene the deterrent purpose of incarceration. The harm caused would likely be amplified where the defendant, automatically deemed to have an extraordinary physical condition because of AIDS, is convicted of a felony. The proper approach under U.S.S.G. § 5H1.4 is to determine, on a case-by-case basis, whether the individual affliction constitutes an extraordinary physical condition, warranting a downward departure.

Significantly, the evidence Mosley offered for his condition was blood tests demonstrating a decrease in his CD4 count. See Exhibit A, Defendant's Departure Brief. These tests are dated March and August, 1996, and present no prognosis. Id. While acknowledging the availability of discretion to grant a departure, after considering the facts of this case, I declined to do so. The Motion for Downward Departure is denied.

Conclusion

Based on the foregoing, the Motion for a New Trial, the Motion for Acquittal and the Motion for Downward Departure were denied.

ALFRED J. LECHNER, JR., U.S.D.J.

c: Melissa E. Rhoads, Deputy Clerk

State of New Jersey

v.

EXHIBIT 118

Sylvester Hosely

Defendant's Correct Name

New Jersey Superior Court

Essex County

Law Division - Criminal

☒ Judgment of Conviction
☐ Change of Judgment
☐ Order for Commitment
☐ Indictment/Accusation Dismissed
☐ Judgment of Acquittal

11-18-48	DATE OF BIRTH
694318	S.B.I. #
6-30-91	DATE OF ARREST
6-05-91	DATE IND / ACC FILED
6-12-91	DATE OF ORIGINAL PLEA
☒ NOT GUILTY ☐ GUILTY	ORIGINAL PLEA

ADJUDICATION BY: DATE

☒ GUILTY PLEA 10-22-93

☐ JURY TRIAL

☐ NON-JURY TRIAL

☐ Dismissed/Acquitted

ORIGINAL CHARGES

IND / ACC No.	Count	Description	Degree	Statute
91-06-0990-I	1	Robbery	2nd	2C:15-1a(1) or (2)

FINAL CHARGES

Count	Description	Degree	Statute
1	Robbery	2nd	2C:15-1a(1) or (2)

It is, therefore, on October 22, 1993 ORDERED and ADJUDGED that the defendant is sentenced as follows:

Count 1 - Custody of the Commissioner of the Department of Corrections for 7 years.
Said sentence to run concurrent with violation of probation. SSCP $75.00
Said sentence to run concurrent with sentence on 91-06-0980.

DEFENDANT REMANDED TO PRISON CUSTODY

CLASSIFICATION CENTER.

☒ It is further ORDERED that the sheriff deliver the defendant to the appropriate correctional authority.

☒ Defendant is in custody under the above number(s) 221484.

TO BE DETERMINED

☐ Defendant is in custody under other name or other number(s) in Custody (N.J.S.A. 2C:44-5(b)(3))

Total Custodial Term 7 Years Credit CCDC

Total Probation Term

COPIES TO: CHIEF PROBATION OFFICER, STATE POLICE, AGS CRIMINAL PRACTICE DIVISION, DEPT OF CORRECTIONS or COUNTY PENAL INSTITUTION

Pa-47

Total FINE $

Total RESTITUTION $

If the offense occurred on or after December 23, 1991 an assessment of $50 is imposed on each count on which the defendant was convicted unless the sole basis includes a higher assessment pursuant to N.J.S.A. 2C:43-3.1 (Assessment is $30 if offense is on or after January 9, 1986 but before December 23, 1991, unless a higher penalty is noted. Assessment is $20 if offense is before January 9, 1986.)

☒ Assessment imposed on

Count(s) 1st

at $ 50.00 each.

Total VCCB Assessment $ 50.00

☐ Installment payments are due at the rate

of $ _____ per _____

beginning _____ (date)

If the offense occurred on or after February 1, 1993 and the sentence is for probation or for a State Correctional facility, a transaction fee of up to $1.00 is ordered for each assessment when a payment or installment payment is made. (P.L. 1992, c. 169)

Victim Name | Telephone Number | Victim Address

Victim | 201-881-4096 | Dennis Friel, Esq.

STATEMENT OF REASONS

Aggravating Factors: Risk that defendant will commit another offense.
Extent of defendant's prior criminal record.
Need for deterring defendant and others.

Mitigating Factors: None

I HEREBY CERTIFY THE FOREGOING IS A TRUE COPY OF THE ORIGINAL RECORD NOW IN MY CUSTODY.

Richard de Cristofaro

FEB 23 1995

By [illegible] Special Deputy

DONALD R. REENSTRA, J.S.C.

10/22/93

COPIES TO: CHIEF PROBATION OFFICER, STATE POLICE, AGS CRIMINAL PRACTICE DIVISION, DEPT OF CORRECTIONS or COUNTY PENAL INSTITUTION

Pa-48

NEW JERSEY SUPERIOR COURT
PASSAIC COUNTY
LAW DIVISION
(CRIMINAL)

IN THE STATE OF NEW JERSEY | Indictment No. 91 06 0990 |

vs | ROBBERY (Second Degree)

SYLVESTER MOSELY,

Defendant

The Grand Jurors of the State of New Jersey for the County of Passaic upon their oath present that Sylvester Mosely, on or about the 30th day of April 1991 in the City of Paterson in the County of Passaic and within the jurisdiction of this Court, did commit an act of robbery upon Veronica Ellerbee, a teller at the First Fidelity Bank located on Madison Avenue, City aforesaid and in the course of committing the theft did threaten her with or purposely put her in fear of immediate bodily injury, contrary to the provisions of N.J.S. 2C:15-1 a (1) or (2) and against the peace of this State, the Government and dignity of the same.

RONALD S. FAVA
PASSAIC COUNTY PROSECUTOR

Endorsed: A TRUE BILL

BY WILLIAM F. GRADISHER, ASSISTANT PROSECUTOR

MARIE L. MONACO, FOREPERSON

Prosecutor's Docket No. 91-2247 Municipal Docket No. 5483

DEC 09 1995

Pa-49

AO 245 S (Rev. 4/90) Sheet 1 - J[illegible] in a Criminal Case

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA

vs

SYLVESTER MOSLEY
(Defendant's Name)

FILED
DEC 9 1996
AT 8:30 ..... M
WILLIAM T. WALSH
CLERK

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 96-00012-01

Donald McCauley, Esq.
Attorney's Name

ENTERED
on
THE DOCKET
on 12-11 19
WILLIAM T. WALSH, CLERK
By [illegible]
(Deputy)

THE DEFENDANT:

___ plead guilty to count(s) _____.
_X_ was found guilty on count(s) 1 and 2 after a plea of not guilty

Accordingly, the defendant is adjudged guilty of such count(s) which involve the following offenses:

TITLE SECTION	NATURE OF OFFENSE	DATE OF OFFENSE	COUNTS
18:2113 a	Bank Robbery	11/20/95	1
18:2113 a	Bank Robbery	11/09/95	2

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

___ The defendant has been found not guilty on counts _____ and is discharged as to such count(s).

___ Count(s) _____ (is/are) dismissed on the motion of the United States.

_X_ It is ordered that the defendant shall pay a special assessment of $ 100.00, for count(s) 1 and 2, which shall be due _X_ immediately ___ as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 147-40-6342 or 147-40-6324;147-12-6342;147-40-6345
Defendant's Date of Birth: 11/18/48 or 11/28/48

Defendant's Address
Union County Jail
15 Elizabeth Plaza
Elizabeth, NJ 07202

December 9, 1996
Date of Imposition of Sentence

Signature of Judicial Officer

Hon. Alfred J. Lechner, Jr., U.S.D.J.
Name & Title of Judicial Officer

Certified as a true copy on
This Date: 12/9/96
By Nicole Rhoads
(Deputy Clerk)

Pa-50

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of prisons to be imprisoned for a term of 210 months on each of Counts 1 and 2 to run concurrently.

_ The court makes the following recommendations to the Bureau of Prisons:

X The defendant is remanded to the custody of the United States Marshal.
_ The defendant shall surrender to the United States Marshal for this district.

_ at _____ a.m. on _____.
_ as notified by the United States Marshal.

_ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.
_ before a.m/p.m. on _____
_ as notified by the United States Marshal.
_ as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____ Defendant delivered on _____ to _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

U.S. GPO. 1990-722-448/10286

STATEMENT OF REASONS

X The court adopts the factual findings and guideline application in the presentence report.

OR

_ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 32

Criminal History Category: VI

Imprisonment Range: 210 to 262 months

Supervised Release Range: 2 to 3 years

Fine Range: $ 17,500.00 to $ 175,000.00

X Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $ 0

X Full restitution is not ordered for the following reason(s):

Inability to pay full restitution.

X The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

_ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reasons(s):

OR

The sentence departs from the guideline range

_ upon motion of the government, as a result of defendant's substantial assistance.

_ for the following reasons(s):

• U.S. GPO-1990-722-448/10286

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

AMENDED

UNITED STATES OF AMERICA

vs

SYLVESTER MOSLEY

(Defendant's Name)

ORIG

FILED

JAN 23 1997

At 8:30 ..... M

WILLIAM T. WALSH
CLERK

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or After November 1, 19

Case Number: 96-00012-01

Donald McCauley, Esq.
Attorney's Name

THE DEFENDANT:

___ plead guilty to count(s) _____.

X was found guilty on count(s) 1 and 2 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s) which involve the following offenses:

TITLE SECTION	NATURE OF OFFENSE	DATE OF OFFENSE	COUNTS
18:2113(a)	Bank Robbery	11/20/95	1
18:2113(a)	Bank Robbery	11/09/95	2

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursu to the Sentencing Reform Act of 1984.

___ The defendant has been found not guilty on counts _____ and is discharged as such count(s).

___ Count(s) _____ (is)(are) dismissed on the motion of the United States.

X It is ordered that the defendant shall pay a special assessment of $ 100.00, for count(s) 1 and 2, which shall be due X immediately ___ as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by thi judgment are fully paid.

Defendant's Soc. Sec. No.: 147-40-6342 or 147-40-6324;147-12-6342;147-40-634
Defendant's Date of Birth: 11/18/48 or 11/28/48

December 9, 1996
Date of Imposition of Sentence

Defendant's Address:
Union County Jail
15 Elizabeth Plaza
Elizabeth, NJ 07202

Signature of Judicial Officer

. Alfred J. Lechner, Jr., U.S.D.J
& Title of Judicial Officer

Date: January 23, 1997

1/23/97

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of prisons to be imprisoned for a term of 240 months on each of Counts 1 and 2 to run concurrently.

__ The court makes the following recommendations to the Bureau of Prisons:

X The defendant is remanded to the custody of the United States Marshal.
__ The defendant shall surrender to the United States Marshal for this district.
__ at _____ a.m. on _____.
__ as notified by the United States Marshal.

__ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.
__ before a.m/p.m. on _____.
__ as notified by the United States Marshal.
__ as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____ Defendant delivered on _____ to _____, with a certified copy of this judgment.

_____
United States Marshal

By_____
Deputy Marshal

U.S. GPO. 1990-722-448/10286

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years on each of Counts 1 and 2 to run concurrently.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant must submit to one drug test within 15 days of commencement of supervised release and at least two tests thereafter as determined by the probation officer. If this judgment imposes a restitution obligation, it shall be a conditions of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

1. The defendant shall refrain from the illegal possession and/or use of drugs and shall submit to urinalysis or other forms of testing to assure compliance. It is further ordered that the defendant shall submit to drug treatment on an outpatient or inpatient basis, if directed by the U.S. Probation Office. The defendant shall abide by the rules of the program and shall remain in treatment until satisfactorily discharged with the approval of the U.S. Probation Office.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquires by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer with 72 hours of any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrest or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record of personal history of characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

U.S. GPO:1990-722-448/10286

STATEMENT OF REASONS

X The court adopts the factual findings and guideline application in the presentence report.

OR

__ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 32

Criminal History Category: VI

Imprisonment Range: 210 to 262 months

Supervised Release Range: 2 to 3 years

Fine Range: $ 17,500.00 to $ 175,000.00

X Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $ 0

X Full restitution is not ordered for the following reason(s):

Inability to pay full restitution.

__ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

X **The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reasons(s):**

The defendant's criminal conduct, combined with an extraordinary extensive criminal history, justifies this sentence, and as explained at sentencing.

OR

The sentence departs from the guideline range

__ upon motion of the government, as a result of defendant's substantial assistance.

__ for the following reasons(s):

• U.S. GPO-1990-722-448/10286